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No. 08-245

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

LACEY RANA SMITH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

PETITIONER'S REPLY TO BRIEF OF RESPONDENT LACEY RANA SMITH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The sole reason that respondent opposes Kansas's petition is the irrelevant assertion that the State did not brief and argue the question presented at every stage in the lower courts. Respondent fails to address the split of authority of which the Kansas Supreme Court decision in this case is a part, and Respondent makes no effort to defend that court's decision on the merits.

Respondent's contention that a lack of full briefing and argument on the question presented in the lower courts provides a "prudential basis" for denying the writ, Brief in Opposition (hereinafter "Opp'n") at 3, is both misguided and irrelevant. Respondent rightly concedes that the fact that the Kansas Supreme Court actually decided the constitutional question presented confers jurisdiction on this Court. Opp'n at 2–3.

Indeed, it is well-settled that "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review." *Franks v. Delaware*, 438 U.S. 154, 161 (1978). As far back as 1914, the Court recognized its authority to review federal questions decided by state courts, even though a particular federal question "had not been expressly asserted below." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). There, the Court observed that, "it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Id.*; *see also, Raley v. Ohio*, 360 U.S. 423, 436 (1959); *Payton v. New York*, 445

U.S. 573, 582 n.19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). Respondent doesn't even suggest, nor could she, that the lower court considered and decided the question now before this Court on anything other than federal constitutional grounds. Pet. App. at 1a–28a. Respondent's attempt to blur the Court's jurisdictional line with an argument of prudential concern is wholly without merit. The fact that her opposition brief relies solely on this red herring further suggests that Respondent recognizes that the question presented involves a conflict of authority and merits this Court's plenary review.

Respondent's argument aside, the Fourth Amendment question before the Court remains open and subject to continuing debate in the lower state and federal courts. Without question, the intersection of the Court's decisions in *Illinois v. Caballes*, 543 U.S. 405 (2005) and *Muehler v. Mena*, 544 U.S. 93 (2005) has resulted in differing opinions on the scope of the second prong under *Terry v. Ohio*, 392 U.S. 1 (1968), presenting a recurring and real issue for law enforcement officers.

Kansas is acutely aware of the practical problem the Kansas Supreme Court's decision creates, because that court's decision in this matter is in direct conflict with decisions on the same question by the Tenth Circuit, the federal Circuit in which Kansas is located. *See, e.g., United States v. Stewart*,

473 F.3d 1265, 1269 (10th Cir. 2007) (if the initial detention is lawful, the Fourth Amendment inquiry is whether police questioning extended the length of the detention; the content of the question is irrelevant). The outcome of this conflict is apparent and troubling—Kansas law enforcement officers now effectively operate under conflicting Fourth Amendment holdings. Kansas law enforcement officers could engage in a traffic stop and questioning with results that would be inadmissible in Kansas state courts but completely admissible in a prosecution by the United States Attorney in federal court. If the difference were a matter of the Kansas Supreme Court independently interpreting the Kansas Constitution, that result would be a necessary outcome of federalism. But here the difference arises solely because the Kansas Supreme Court and the Tenth Circuit have adopted different answers to the same Fourth Amendment question.

Moreover, the Kansas Supreme Court's decision here is at odds not only with the Tenth Circuit, but also with the decisions of several other Circuits and state courts of last resort. *See* Pet. at 11–13. The question presented was implicated in *Caballes*, *see* 543 U.S. at 421 n.3 (Ginsburg, J., dissenting), but not resolved by the Court. Like many Fourth Amendment issues, the question presented here arises with some frequency. It has percolated long enough to generate numerous decisions in the lower courts and a split of authority, *cf. Johnson v. Texas*, 509 U.S. 350, 379 (1993) (O'Connor, J., dissenting), and this case offers an appropriate vehicle to answer the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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